

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

CHERYL LESLIE,) Case No. CV 13-7056 GAF (RZx)

Plaintiff,

V.

Case No. CV 13-7056 GAF (RZx)

MEMORANDUM & ORDER REGARDING BENCH TRIAL

**UNITED OF OMAHA LIFE
INSURANCE COMPANY; and DOES
1 through 10, inclusive,**

Defendants.

L.

INTRODUCTION

In September 2011, Plaintiff Cheryl Leslie (“Plaintiff” or “Leslie”) began working at Covenant House California (“CHC”), a homeless shelter, as an Administrative Service Coordinator (Purchasing/Finance). Between her first and final day of work on June 28, 2012, Leslie was placed “off work” six times via multiple doctors’ Work Status Reports for varying diagnoses and reasons.

Leslie thereafter submitted a claim to her Long Term Disability (“LTD”) insurer, defendant United of Omaha Insurance Company (“United”), which also administered the LTD Plan. United denied the claim and this lawsuit followed.

1 Because Leslie's claim was initially based on her severe clinical depression,
 2 which both parties acknowledge pre-dated coverage under the LTD Plan, United denied
 3 the claim because the policy excludes from coverage disabilities arising from pre-
 4 existing conditions. That decision is not at issue in this case. Rather, after the first
 5 denial, Leslie asked United to review her claim based on revised medical reports
 6 indicating that Fibromyalgia and not clinical depression was her primary and disabling
 7 condition. United considered the new information but reiterated its denial of Leslie's
 8 LTD claim on the ground that her Fibromyalgia did not render her Totally Disabled
 9 from her Occupation under the terms of the LTD Plan.

10 In this lawsuit, Leslie contends that United should grant her LTD benefits
 11 because United used the wrong Usual Occupation (hereinafter "Occupation") when
 12 evaluating whether she was Totally Disabled and that her Fibromyalgia has Totally
 13 Disabled her from performing her actual Occupation. (Docket No. 21 [Plaintiff
 14 Opening Mem. ("Plaintiff Mem.")].) United responds that it acted properly in denying
 15 Leslie LTD benefits because it was correct in its characterization of Leslie's
 16 Occupation, Leslie is not totally disabled by Fibromyalgia from that Occupation, and
 17 that even if she was, such disability would not be covered under the LTD Plan because
 18 it was rooted in a pre-existing condition and is thus excluded under the LTD Plan.
 19 (Docket No. 22 [United's Opening Mem. ("United Mem.")]).¹

20 The matter came for trial on the administrative record on September 30, 2014.
 21 Plaintiff asserts and United does not object that the Court should evaluate the plan
 22 administrator's disability findings under a *de novo* standard of review. Having
 23 considered the evidence in the administrative record, the briefing of the parties, and the
 24 arguments presented at trial, the Court finds for United. The Court concludes that

25
 26
 27 ¹The issue of whether fibromyalgia was a pre-existing condition was not mentioned in United's denial of
 28 Leslie's appeal. However, because the parties debate it in their memoranda, the Court will briefly address
 the question at the end of this order.

1 United used the proper Occupation in its analysis and that Leslie is not Totally Disabled
 2 from performing the substantial and material duties of that occupation.

3 **II.**

4 **BACKGROUND**

5 In September 2011, Plaintiff Cheryl Leslie (“Plaintiff” or “Leslie”) began
 6 working at CHC, a homeless shelter, as an Administrative Service Coordinator with
 7 duties in purchasing and finance. (Docket No. 24 [Declaration of Molly Juehl] at
 8 Docket No. 26, Ex.A [Administrative Record (“AR” at 63, 611)]; see also, id. at 260.)
 9 During her time as an employee of CHC, Leslie was insured under a Group-Long Term
 10 Disability Insurance Policy (“Plan”) number GLTD-0A16X through United. (Id. at 1,
 11 14, 63.)

12 Leslie’s final day of work at CHC was June 28, 2012. (See id. at 66, 101.) She
 13 claimed that she had become disabled and later submitted a Long Term Disability
 14 (“LTD”) Claim around the end of September or beginning of October. (Id. at 606.)²
 15 Her claim was denied. In this suit she contends that she is both (a) disabled from her
 16 Occupation and (b) by a condition which was not pre-existing.

17 **A. PLAINTIFF’S OCCUPATION**

18 Despite her job title, which suggests that Leslie’s position as Administrative
 19 Services Coordinator is essentially a sedentary administrative position, what her
 20 Occupation actually requires is a subject of dispute in this case. (Id. at 63, 611.)

21 In her initial LTD Application, Leslie described her job duties at CHC as
 22 “[p]urchas[ing] all items for LA & Oakland facilities, oversee maintenance & janitorial
 23 staff in LA.” (Id. at 608.) She listed the physical requirements of her job at CHC as
 24 “[w]alking, climbing stairs, [and] lifting boxes.” (Id.)

25
 26 ²From March through October 2012, Leslie was ordered off work six times by physicians for various
 27 reasons including her anxiety and her Fibromyalgia. (See id. at 570.) Dr. McIntosh was the physician
 28 placing Leslie off work three times. (See id.) Twice Fibromyalgia was listed as the sole diagnosis on the
 work status report ordering Leslie off work. (See id. at 622, 624.)

1 In the “Employer’s Statement” portion of the initial LTD Claim, John Garcia,
 2 Director of Human Resources at CHC, indicated that Leslie’s job involved “continuous
 3 (67%-100%)” use of a computer, relating to others, written and verbal communication,
 4 and walking; “frequent (34%-66%)” use of reasoning, math and language skills;
 5 between “frequent (34%-66%)” and “occasionally (0%-33%)” standing; and
 6 “occasionally (0%-33%)” making independent judgments, stooping, climbing one flight
 7 of stairs, and lifting/carrying. (Id. at 612-613.) Regarding activities involving lifting,
 8 carrying, pushing or pulling, Mr. Garcia indicated Leslie’s job involved “[r]eceiving
 9 purchased goods 40-50 pounds (on oc.–not off. [sic])” (Id. at 613.) Mr. Garcia also
 10 attached a two page-long description of job duties and requirements for Leslie’s
 11 position, including a requirement that an applicant “[m]ust be able to lift up to 40-50
 12 lbs. on occasion, bend, sit and stand for prolonged periods of time.” (Id. at 614-15.)

13 United had a vocational consultant prepare an Occupational Analysis (“OA”) as
 14 part of a vocational file review for Leslie. (Id. at 114-16.) In preparing the OA, the
 15 consultant reviewed the referral document from the United claims worker assigned to
 16 Leslie’s case, the Employer’s statement with Job Analysis section of the LTD Claim,
 17 and the Job description of Administrative Services Coordinator (Purchasing &
 18 Facilities). (Id. at 114.) Additionally, the consultant used “standard vocational
 19 resources including: The Dictionary of Occupational Titles (DOT), U.S. Department of
 20 Labor Employment and Training Administration, Fourth Edition, revised, 1991; [sic]
 21 Occupational Information Network (O*Net), and the Classification of Jobs, 2000, Elliot
 22 and Fitzpatrick, 1999.” (Id.)

23 Based on those sources of information, United’s vocational consultant’s analysis
 24 concluded that the position of an Administrative Services Coordinator involves
 25 administrative service functions such as the “administration of purchasing activities,
 26 preparing purchase orders, monitoring vendor contracts, managing the facilities budget,
 27 ordering and organizing general office supplies, stocking and withdrawals, overseeing
 28 the general maintenance workers and housekeeping crew.” (Id. at 114-15.) United

1 claims Leslie's position would use the DOT Code of Building Supervisor, who
 2 generally falls within the Light exertion level, requiring "exerting up to 20 pounds of
 3 force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible
 4 amount force constantly to move objects." (*Id.* at 115.) United did address the alleged
 5 40-50 pounds alleged in the Job Description provided by CHC, noting that this was "on
 6 an occasional basis and not often" and would cause the job to "fall within the light to
 7 medium work category." (*Id.* at 116.) Additionally, it stated that "[a]lthough the
 8 position was entitled administrative in nature, the tasks involved facilities coordination
 9 with frequent to constant standing and walking and occasional climbing of ladders.³"
 10 (*Id.*)

11 **B. PLAINTIFF'S MEDICAL HISTORY**

12 Before her employment at CHC, Leslie had been treated by numerous doctors
 13 over the course of her lifetime. A victim of child abuse, Leslie has suffered from
 14 depression since a young age and has received treatment and medication for depression
 15 since at least May 2011. (*Id.* at 196, 276; see also, *id.* at 133 (noting Leslie was on
 16 depression medication since April 2011).)

17 In 2011, Leslie had appointments with the Family Medicine Associates of
 18 Northridge ("FMAN"). (*Id.* at 586-88.) During this time, Leslie was treated and
 19 prescribed medication for depression. (*Id.* at 276, 277.) Leslie complained of shoulder
 20 and upper back pain at her August 11, 2011, appointment, but no diagnosis regarding
 21 such pain was indicated. (See *id.* at 587.)

22 In 2012, she began seeing doctors at Kaiser. (See *id.* at 131.) On January 16,
 23 2012, she first saw Dr. Roraldo at Kaiser for a physical exam. (*Id.* at 133.) During her
 24 check-up Dr. Roraldo noted Leslie's history of depression, pain in her neck, and pain in
 25 her shoulder blades. (*Id.*) Leslie stated her shoulder pain had occurred since she had

26
 27 ³Nowhere on the Job Description is the climbing of ladders, occasional or otherwise, mentioned or
 28 denoted. (*Id.* at 613-615.) Instead, the form indicates that the job occasionally requires climbing one
 flight of stairs. (*Id.* at 613.)

1 been in a motor vehicle accident in June 2011 and that the pain worsened “with
 2 overhead reaching.” ([Id.](#)) She had been referred to physical therapy, but had lost her
 3 insurance. ([Id.](#)) During Leslie’s follow up visit with Dr. Roraldo on April 20, 2012 Dr.
 4 Roraldo started her on Gabapentin.⁴ ([Id.](#) at 166.) When Leslie saw Dr. Roraldo again
 5 on May 29, 2012, she continued to complain of generalized body pains that had endured
 6 for at least 8 years. ([Id.](#) at 174.) At that appointment Dr. Roraldo noted that Leslie had
 7 Myalgia, possibly Fibromyalgia. ([Id.](#) at 175.)

8 In March 2012, Leslie began seeing Dr. McIntosh from Kaiser’s Psychiatry
 9 department. ([See e.g., id.](#) at 537.) On March 19, 2012, Dr. McIntosh evaluated Leslie,
 10 noting her depression and that Leslie had “a lot of stress from the workplace.” ([Id.](#))
 11 She also noted that “[s]ome days [Leslie] c[ould]n’t get out of the bed and want[ed] to
 12 be left alone. 2 days a week, [Leslie] has difficulty.” ([Id.](#)) Additionally, Dr. McIntosh
 13 noted Leslie was “chronically fatigued” and “unable to concentrate” or “focus.” ([Id.](#))
 14 On March 29, 2012, Dr. McIntosh saw Leslie again but did not note any new
 15 developments. ([Id.](#) at 540.) At a later appointment on May 30, 2012, Dr. McIntosh
 16 entertained the possibility of Fibromyalgia being a possible cause of Leslie’s pains.
 17 ([See id.](#) at 544 (noting “? Diagnosis of fibromyalgia.”).) However, Dr. McIntosh did
 18 not include Fibromyalgia in her assessment, listing only Leslie’s depression and
 19 anxiety. ([Id.](#))

20 Leslie saw another Kaiser doctor, Dr. Salehi, for a second opinion regarding her
 21 potential Fibromyalgia on June 7, 2012. ([Id.](#) at 188.) He drew the same conclusion as
 22 Dr. Roraldo and noted Leslie was “scheduled with rheumatology in 3 days.” ([Id.](#) at
 23 189.) On June 11, 2012, Leslie saw Dr. Tang from Kaiser’s rheumatology department.
 24

25 ⁴According to MedlinePlus, a service of the U.S. National Library of Medicine, Gabapentin is used “to
 26 help control certain types of seizures in people who have epilepsy . . . to relieve the pain of postherpetic
 27 neuralgia [an after-effect of shingles] . . . [and] to treat restless legs syndrome . . . [but] is also sometimes
 28 user to relieve the pain of diabetic neuropathy . . . and to treat and prevent hot flashes . . . in women who
 are being treated for breast cancer or who have experienced menopause.” (U.S. National Library of
 Medicine National Institute of Health, [Gabapentin](http://www.nlm.nih.gov/medlineplus/druginfo/meds/a694007.html), (last visited October 17, 2014),
<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a694007.html>.)

(Id. at 196-97.) In Dr. Tang's patient history he noted Leslie's "depression [began] in her young age (< 10) and diffuse body pain (non-neuropathic) began in late teen (19)." (Id. at 196.) Leslie's medical records reflect a first *diagnosis* of fibromyalgia during the June 11 appointment with Dr. Tang. (Id. at 198.) Dr. Tang started Leslie on Norco to treat her Fibromyalgia. (Id. at 200; see also, id. at 206.)

Leslie saw Dr. McIntosh twice more, on June 22, 2012 and June 28, 2012. (Id. at 546, 548.) At these appointments, Leslie complained of pain. (Id.) At her July 17, 2012, appointment with Dr. McIntosh, Leslie complained of “an abundance of pain.” (Id. at 550.)

Leslie sought a second opinion regarding her Fibromyalgia from a Kaiser doctor, Dr. Au, on July 20, 2012. (*Id.* at 222.) Dr. Au confirmed Dr. Tang's diagnosis. (*Id.*) During that appointment Leslie stated that the Gabapentin helped her pain, but that "she still has bad days . . . [and] complains mostly of fatigue . . . [and] has significant difficulty getting up and around in the mornings." (*Id.* at 222.) Dr. Au's assessment and plan for treatment of her Fibromyalgia included an increase in her Gabapentin and her Effexor medications. He also recommended improved sleep hygiene, exercising, and avoiding opiates. Dr. Au considered switching to Cymbalta or Lyrica if Leslie continued to have significant pain or referring her to chronic pain management for cognitive behavioral therapy in the future. (*Id.* at 224.)

Leslie saw Dr. McIntosh again on August 9, 2012. (*Id.* at 552.) At this appointment Leslie stated she was “in chronic pain.” (*Id.*) Also, Dr. McIntosh first included Fibromyalgia in her assessment of Leslie.

Leslie later saw Dr. Ching, a Kaiser pain management specialist whom Dr. Roraldo had referred her to, on August 24, 2012. (*Id.* at 230.) After Leslie's physical examination, Dr. Ching noted that Leslie did not appear to be in any acute distress but assessed that Leslie had chronic neck, upper back, arm and leg pain. (*Id.* at 232-33.) Dr. Ching emphasized that Fibromyalgia was "not a degenerative or malignant process" and that the "primary management of symptoms is low impact aerobic exercise, good

1 sleep hygiene, [and the] proper management of depression/anxiety/stress.” (Id. at 233.)
 2 Leslie received “[t]rigger point injections” of Lidocaine in her bilateral trapezius
 3 muscles. (Id. at 234.)

4 Leslie tried to see Dr. McIntosh on September 26, 2012, however, she was
 5 unable to do so because at that point she had lost her Kaiser insurance. (Id. at 554.) Dr.
 6 McIntosh filled out paperwork Leslie requested.⁵ (Id.)

7 Leslie went to FMAN for treatment on October 15, 2012. (Id. at 125.) There,
 8 Dr. Gagneja⁶ noted that Leslie was having sleeping problems and “need[ed]
 9 Rheumatology or pain man[agement.]” (Id.) Leslie saw Dr. Chung of the Facey
 10 Medical Group (“Facey”), a rheumatologist, on October 22, 2012 for a “consultation
 11 relating to fibromyalgia.” (Id. at 390.)⁷ At that appointment, Leslie explained her
 12 history of anxiety and depression and “explain[ed] also that she has secondary
 13 Fibromyalgia with symptoms of chronic muscle aches, muscle sensitivity, chronic sleep
 14 disturbance, and fatigue.” (Id.) Additionally, after Leslie’s physical examination Dr.
 15 Chung noted that Leslie was “comfortably seated [and] in no acute distress,” and that
 16 she “ha[d] full range of motion of her shoulders elbows and wrists . . . [and] no joint
 17 swelling or pain.” (Id. at 392.) Dr. Chung “c counseled [Leslie] on the importance of
 18 treatment and counseling for her Major Depression in order to derive benefit also in her
 19 Fibromyalgia symptoms.” (Id.) Leslie saw Dr. Chung again on November 28, 2012, at
 20 which time Dr. Chung’s assessment was largely unchanged. (Id.) At that appointment,

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 22 ⁵While there is no description of this paperwork, it appears that this paperwork was the Physician’s
 23 Statement Leslie submitted as part of her initial LTD Application shortly thereafter.

24 ⁶The Doctor only signed the medical notes as “Dr. G” however, as there are four doctors at the FMAN,
 25 only one of whom’s last name begins with G, the Court infers this refers to Dr. Gagneja. (See id. at 125.)

26 ⁷Dr. Chung noted, “she begins by stating that she has a history of severe Major Depression ever since she
 27 was a child. She states that she was abused as a child and does not wish to go into details today. She
 28 states that she previously worked at a homeless shelter with 18-21 year-olds and experienced post-
 traumatic stress disorder from encounters with violent clients and a death threat sent to herself as well as
 staff April of this year. She has since had episodes of anxiety and panic alternating with worsening
 depression.” (Id. at 390.)

1 Dr. Chung started Leslie on an experimental use of low-doses of Naltrexone “[f]or
 2 specifically her fibromyalgia symptoms of muscle aches and pains.” (Id. at 389.)

3 Leslie saw Dr. Chung again on February 18, 2013. (Id. at 260-63.) At that
 4 appointment Dr. Chung noted that Leslie was “being actively treated for Fibromyalgia
 5 with symptoms of chronic muscle aches, muscle sensitivity, chronic sleep disturbance,
 6 and fatigue . . . [and Leslie] noted ongoing tenderness of the anterior chest wall.” (Id.
 7 at 260.) Because of her loss of insurance, Leslie “weaned herself off Effexor gradually,
 8 and initiated Amitriptyline . . . for Fibromyalgia.” (Id.) Leslie also stated that she
 9 “continue[d] to have increased muscle aches, tenderness, and a foggy sensorium
 10 attributed to the cold weather.” (Id.) Dr. Chung’s notes regarding Leslie’s physical
 11 examination still described Leslie as “comfortable seated [and] in no acute distress . . .
 12 [and that she] ha[d] full range of motion of her shoulders elbows and wrists.” (Id. at
 13 262.) Dr. Chung recommended to continue on with the treatment plan of various
 14 exercises to strengthen muscles. (Id. at 263.)

15 **C. DEFINITIONS UNDER THE LTD PLAN**

16 The LTD Plan under which Plaintiff claimed LTD benefits around the end of
 17 September or beginning of October in 2012 contains the following definitions:

18 **Totally Disabled** and **Total Disability** means that as a result of
 19 Injury or Sickness You are unable to perform with reasonable
 20 continuity the Substantial and Material Acts necessary to pursue
 21 Your Usual Occupation and You are not working in Your Usual
 22 Occupation. After a Monthly Benefit has been paid for 24
 23 months, You are Totally Disabled when as a result of Injury or
 24 Sickness You are not able to engage with reasonable continuity in
 25 any occupation in which You could reasonably be expected to
 26 perform satisfactorily in light of Your age, education, training,
 27 experience, station in life, and physical and mental capacity.

28 (Id. at 51.)

1 **Usual Occupation** means any employment, business, trade or
2 profession and the Substantial and Material Acts of the
3 occupation You were regularly performing for the Policyholder
4 when Disability began. Usual occupation [sic] is not necessarily
5 limited to the specific job You performed for the Policyholder.

6 (Id.)

7 **Substantial and Material Acts** means the important tasks,
8 functions and operations generally required by employers from
9 those engaged in Your Usual Occupation that cannot be
10 reasonably omitted or modified. In determining what substantial
11 and material acts [sic] are necessary to pursue Your Usual
12 Occupation, We will first look at the specific duties required by
13 Your employer. If You are unable to perform one or more of
14 these duties with reasonable continuity, We will then determine
15 whether those duties are customarily required of other employees
16 engaged in Your Usual Occupation. If any specific, material
17 duties required of You by Your employer differ from the material
18 duties customarily required of other employees engaged in your
19 Usual Occupation, then We will not consider those duties in
20 determining what substantial and material acts [sic] are necessary
21 to pursue Your Usual Occupation.

22 (“Substantial and Material Act” or “Substantial and Material”) (Id.)

23 **Pre-existing Conditions** You are not covered for a Disability
24 caused or substantially contributed to by a Pre-existing Condition
25 or medical or surgical treatment of a Pre-existing Condition. You
26 have a Pre-existing Condition if:

- 27 (a) You received medical treatment, care or services for a
28 diagnosed condition or took prescribed medication for a

diagnosed condition in the 3 months immediately prior to the effective date of coverage under this Policy; and

(b) the disability caused or substantially contributed to by the condition begins in the first 12 months after the effective date of coverage under this Policy.

(Id. at 33.)

D. PLAINTIFF'S INITIAL LTD APPLICATION

After Leslie terminated her employment with CHC in June 2012, (see id. at 566, 611), she filed her LTD Claim with United around the end of September or beginning of October 2012. (Id. at 606-10.) She claimed she was unable to work because of “uncontrolled pain, inability to focus or complete tasks, [and] extreme anxiety. (Id. at 606.) She claims her job contributed to her disability because “stress increase[d] [her] symptoms.” (Id. at 606.)

The “Attending Physician’s Statement” and “Physician’s Statement” portions of the initial LTD Claim, filled out by Dr. McIntosh, listed Major Depression, Recurrent, Acute Stress Disorder, and Fibromyalgia as the Diagnosis. (*Id.* at 616-18.) It noted the primary diagnosis was “Major Depression, Severe” and that “Fibromyalgia” was a secondary condition. (*Id.* at 617.) Regarding restrictions on the patient’s movements, Dr. McIntosh wrote that Leslie had no restrictions on things she should not do, and was able to sit, stand, and walk for eight hours in an eight hour workday. (*Id.* at 618.)

On January 31, 2013, United wrote to Leslie informing her that her Initial LTD Claim was denied. (*Id.* at 328-31.) Based on the Attending Physician's Statement, United had determined that Major Depression was a pre-existing condition not covered under the LTD Plan. (*Id.* at 329.) United noted that it was not addressing whether her medical records supported her inability to perform the duties of her Occupation because the pre-existing condition was dispositive. (*Id.* at 329.)

1 **E. PLAINTIFF'S APPEAL**

2 Leslie acknowledges that her depression was a pre-existing condition, and
3 therefore was unable to challenge that aspect of the determination on appeal. She took a
4 different tack.

5 On February 14, 2013, Leslie emailed United and asked them to “re-review
6 [her] claim” based on new forms and that her primary disabling condition was
7 Fibromyalgia, not depression. (Id. at 309.) She stated she “was not able to have her
8 Rheumatologist fill out the claim paperwork back when the claim was initially filed due
9 to losing [her] Kaiser coverage.” (Id. at 309.)

10 The “new forms” she included were a new version of the “Physician’s
11 Statement” portion of the application, this time filled out by Dr. Chung and Dr. Chung’s
12 notes from her evaluation of Leslie on January 28, 2013. (Id. at 310-11; 312-15.) On
13 the new forms, Dr. Chung listed Leslie’s primary condition as “Fibromyalgia” and her
14 secondary condition as “Chronic Major Depression.” (Id. at 310.) Additionally, Dr.
15 Chung indicated that Leslie could only spend one to three hours sitting, standing, and
16 walking in an eight hour work day. (Id. at 311.) The field regarding any restrictions on
17 the patient’s movements was left blank. (Id.)

18 On June 19, 2013, United wrote to Leslie explaining that they had completed
19 the review of her LTD Appeal and were upholding the denial of her claim. (Id. at 105-
20 10.) United explained that Leslie’s medical records did “not provide evidence of an
21 impairment precluding work” and that “there [was] no medical support for restrictions
22 and limitations that would prevent [her] from performing the substantial and material
23 acts of [her] usual occupation, [sic] which is light physical strength demand.” (Id. at
24 109.)

25 **F. THE LAWSUIT**

26 The appeal presents two principal questions. First, the Court must determine
27 whether United correctly characterized the substantial and material duties of Leslie’s
28 occupation. If so, then the Court must determine whether the diagnosis of fibromyalgia

supports Leslie's claim that her medical condition precluded her from performing the Substantial and Material duties of her Occupation.

III.

DISCUSSION

A. ERISA Standard of Review

When Congress enacted ERISA, it did so to protect the “interests of participants in employee benefit plans and their beneficiaries.” 29 U.S.C. § 1001(b). To this end, ERISA requires employers and plan administrators to provide participants with certain information about their benefits plans. It also permits a participant to file a civil action in federal court to challenge a denial of benefits under a benefits plan. 29 U.S.C. 1132(a)(1)(B); Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 108 (2008). When presiding over such a cause of action, and reviewing a plan administrator’s decision to deny benefits to a participant, a district court applies one of two standards of review: it either reviews the decision de novo, or for an abuse of discretion. The default standard of review is de novo. See Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). A court reviews for abuse of discretion where the plan itself provides for it or otherwise grants the administrator discretionary authority to determine a participant’s eligibility for benefits. Metro. Life Ins., 554 U.S. at 111.

Here, Plaintiff asserts and United does not object that the proper standard of review is de novo. (Plaintiff Mem. at 2; see generally United Mem. and Docket No. 27 [United Reply Mem. (“United Reply”)].) Accordingly, the Court must review the administrative record without deference to determine whether Defendant correctly terminated Plaintiff’s LTD benefits. Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 963 (9th Cir. 2006).

“On *de novo* review, a district court may, in conducting its independent evaluation of the evidence in the administrative record, take cognizance of the fact (if it is a fact in the particular case) that a given treating physician has ‘a greater opportunity to know and observe the patient’ than a physician retained by the plan administrator.”

1 Jebian v. Hewlett-Packard Co. Employees Benefits Organization Income Protection
2 Plan, 349 F.3d 1098, 1109 n.8 (9th Cir. 2003). Here, Leslie had many treating
3 physicians and was not examined by any physician on behalf of United. (Id. at 11-12.)
4 Accordingly, the Court will give deference to each of her treating physicians. However,
5 as the discussion below indicates, the information from her treating physicians provides
6 little support for her arguments.

7 **B. APPLICATION**

8 At the outset, it is worth noting that Leslie's treating physicians reversed the
9 diagnosis in the Treating Physician's Statement in response to United's denial of
10 benefits. Dr. McIntosh, who filled out the first such form, identified major depression
11 (a pre-existing condition) as the primary basis for concluding that Leslie was disabled.
12 (Id. at 616-18.) Because of the pre-existing condition limitation, United denied the
13 claim. Then, Leslie obtained a new statement from Dr. Chung who had seen Leslie
14 several times during 2012.

15 Dr. Chung noted that Leslie had herself described her fibromyalgia as secondary
16 to major depression, and reported that she counseled Leslie "on the importance of
17 treatment and counseling for her Major Depression in order to derive benefit also in her
18 Fibromyalgia symptoms." (Id. at 392.) Again in January 2013, at about the same time
19 that she submitted her Treating Physician's Statement in support of Leslie's appeal of
20 the denial of her benefit, Dr. Chung wrote, "This patient has a history of Major
21 Depression and Post-traumatic stress disorder with ***secondary Fibromyalgia***." (Id. at
22 315.) Thus, Dr. Chung's Treating Physician's Statement was inconsistent with her
23 contemporaneous treatment notes. The statement specifically identified Leslie's
24 primary condition as "Fibromyalgia" with "Chronic Major Depression" as a secondary
25 symptom when the record is completely devoid of any evidence to support that
26 conclusion. (Id. at 309.) This change in response to the denial of benefits raises
27 questions concerning its reliability and the weight to be given to the revised claim for
28 benefits.

Moreover, Dr. Chung's notes, both before and after she submitted the Treating Physician's Statement based on a January 28, 2013 evaluation, suggested that, with respect to her Fibromyalgia symptoms, Leslie was not in acute distress. These notes repeatedly indicated that Leslie was comfortably seated, in no acute distress, and with full range of motion in shoulders, elbows and wrists. (E.g., id. at 392 (Oct. 22, 2012 examination), 389 (November 28, 2012 examination), 262 (Feb. 18, 2013 examination)). Thus, there are substantial reasons for distrusting the second Treating Physician's Statement submitted in support of Leslie's claim.

1. PLAINTIFF CLAIMS THAT HER JOB REQUIRED HEAVY LIFTING

Plaintiff bears the burden of proving entitlement to benefits. Muniz v. Amec Constr. Mgmt. Inc., 623 F.3d 1290, 1294 (9th Cir. 2010). To determine whether she has met that burden, the Court must assess the evidence in light of the contract definition of total disability. Here that means that Leslie must prove that she was disabled from performing "the important tasks, functions and operations generally required by employers from those engaged in Your Usual Occupation that cannot be reasonably omitted or modified" so long as the disability did not result from a pre-existing condition. With respect to her depression, all concede that it is a pre-existing condition. (Docket No. 28 [Plaintiff Reply Mem. ("Plaintiff Reply")] at 4.) Thus, the case centers on the allegedly disabling condition of fibromyalgia in light of the policy definition and her job duties.

Leslie essentially contends that the Court need not reach the issue of pre-existing condition because the "important tasks and functions of her job that could not reasonably be omitted or modified" included lifting 40 to 50 pounds. Because her fibromyalgia precluded her from lifting that much weight, she contends that she is totally disabled. As explained below, the Court finds that: (1) the ability to lift 40-50 pounds was not a "substantial and material" requirement of Leslie's Occupation and thus is outside the scope of the proper occupational definition; (2) Leslie is not Totally Disabled from performing that the properly defined Occupation; but (3) even if Leslie is

Totally Disabled within the meaning of the policy, her fibromyalgia is a pre-existing condition and her disability is not covered by the policy.

2. LIFTING 40-50 POUNDS IS NOT A REQUIREMENT OF LESLIE'S “OCCUPATION”

At the threshold, Plaintiff urges that she “should be given an opportunity to present evidence on the issue of whether or not the [Occupation] identified by [United] is in fact the closest match to her actual occupation.” (Plaintiff Reply at 9.) However, having been through two levels of review and briefing for this trial, Plaintiff offers no good reason or any persuasive authority in support of this belated request. Moreover, she does not even proffer any additional evidence that would tend to undermine United’s analysis of her Occupational duties. Rather, Plaintiff repeatedly asserts that her job requires lifting 40-50 pounds and that such requirement was impermissibly omitted from her Occupation. (Plaintiff Mem. at 4; Plaintiff Reply at 8-9.) Thus, the Court will assesses whether the purported lifting requirement is an “important task[], function and operation[] generally required by employers from those engaged in” her Occupation.

a. Job Duties Leslie Listed in Her LTD Application

Leslie’s legal position is undermined by her own attempt to obtain LTD benefits. In her initial LTD Application, Leslie did not list lifting 40-50 pounds, occasionally or otherwise, as one of her job duties. (See id. at 608.) Rather, when asked about physical requirements of the job, she listed “lifting boxes” but without indicating any particular weight range. (Id.) Given that she was applying for disability benefits, it is implausible that Leslie would have failed to mention it had she customarily been required to lift such heavy loads in the ordinary course of her duties.

1 ***b. Leslie's Employer's Job Description***

2 United's exclusion of lifting 40-50 pounds as an "important task, function or
3 operation" of her job is not undermined by the information supplied by Leslie's
4 employer.

5 Leslie's employer provided detailed information regarding Leslie's position as
6 Administrative Services Coordinator/Purchasing and Facilities. (Id. at 612-15.) The
7 position is summarized as follows:

8 Under the supervision of the CFO performs various administrative
9 services functions and takes lead on projects as assigned. The position is
10 responsible for maintaining confidential information and safeguarding
11 the integrity of CHC's financial data and administrative data systems.
12 Essential areas of coordination with the CFO and the maintenance staff
13 and completion of tasks include: timely completion of all purchasing
14 tasks; identifies problems with facilities in terms of functioning and
15 appearance, analyzes potential solutions and plans a strategy for
16 completion of solution as; back up for IT staff on leave to complete basic
computer tasks as needed; insures that duties and tasks performed are
compliant with the company's purchasing policies, administrative and
accounting policies and procedures.

17 (Id. at 614.)

19 Under coordination of facilities management, the job description contains 10
20 bullet points that describe the numerous duties encompassed in the purchasing,
21 maintenance and housekeeping functions of the position. (Id.) Other duties include
22 assisting in the maintenance of the time clock system and other information systems,
23 back-up to accounting and payroll on an as needed basis, and support for CFO in
24 maintaining department records and performance of projects. (Id.) Given these duties,
25 the job required a B.A. degree in business management, accounting or a related field
26 and a minimum of 3 to 5 years experience in purchasing, facilities and related positions
27 with preference for additional background in accounting and purchase order cost

1 coding. (*Id.* at 615.) Among other things, the position required strong organizational
2 skills, the ability to set priorities, and proficiency “in all MS Office applications such as
3 Outlook, Word, and Excel.” (*Id.*) It also indicates that, “on occasion,” the position
4 requires lifting of 40 to 50 pounds.” (*Id.*) This was reiterated in information provided
5 by the Human Resources manager who indicated that the administrative services
6 coordinator would have to lift 40 to 50 pounds “(on oc.– not off.)” (*Id.* at 613.)

7 These materials clearly indicate that lifting 40 to 50 pounds was considered a
8 job duty, but because it was described as something required “on occasion” and far
9 outside the bulk of the job duties, the question is whether it constituted a Substantial and
10 Material task associated with the position. (*Id.* at 51.) As the disability policy indicates,
11 the insurer looks first to the actual duties required by the employer and then, if the
12 employee cannot perform those duties, assesses whether “those duties are customarily
13 required of other employees engaged in Your Usual Occupation.” (*Id.* at 51.) If they
14 are not customarily required of other employees in that position, they are excluded from
15 consideration as a Substantial and Material Act necessary to perform the duties of
16 “Your Usual Occupation.” (*Id.*)

17 Given the nature of the job, its broad administrative and managerial duties and
18 responsibilities, and the education and training required to perform the job, heavy lifting
19 appears at best to be an insubstantial and immaterial aspect of the job, and one that
20 could easily be modified to accommodate an otherwise qualified candidate for the
21 position. The record supports such a conclusion.

22 ***c. United’s Vocational Consultant’s Analysis***

23 United’s vocational consultant’s analysis provides substantial evidence that
24 lifting 40-50 pounds was properly excluded as a Substantial and Material task of
25 Leslie’s Occupation. As permitted under the LTD Plan, United had a vocational
26 consultant evaluate Leslie’s Occupation to determine whether she was Totally Disabled
27 therefrom. (*Id.* at 114-16.) In determining Leslie’s Occupation, the consultant used
28 information provided in Leslie’s Initial LTD Application, and several neutral sources

such as the DOT, O*net, and other publications authored by the Department of Labor. The vocational consultant specifically noted the disputed requirement of lifting 40-50 pounds. (See id. at 116.) Because of the occasional nature of the activity, the vocational consultant decided it was not a Substantial and Material Act and thus excluded it from Leslie's Occupation. (Id.) Instead, the vocational consultant concluded that Leslie's occupation was similar to "building supervisor," and that "this occupation is performed at the light physical demand level." (Id. at 107.) Accordingly, United concluded that

there is no medical support for restrictions and limitations that would prevent you from performing the substantial and material acts of your usual occupation, which is light physical strength demand.

(Id. at 109.)

Based on the evidence in the record, the Court is convinced that lifting 40-50 pounds was not a Substantial and Material Act of Leslie's Occupation as it was occasional and could reasonably be omitted. Thus, United properly omitted such activity from Leslie's Occupation in analyzing whether Leslie was Totally Disabled. Having reached that conclusion, it follows, as discussed below, that Leslie's fibromyalgia does not render her totally disabled within the meaning of the policy.

3. LESLIE IS NOT TOTALLY DISABLED BY HER FIBROMYALGIA

Leslie claims her Fibromyalgia has Totally Disabled her from performing her Occupation. Based on the weight of the medical evidence, including Dr. McIntosh's Statement, and Dr. Chung's notes, the Court concludes that the clear weight of evidence demonstrates Leslie is not Totally Disabled from her Occupation and that LTD benefits were properly denied.

a. Leslie's Medical Records

The first factor weighing in United's favor is Leslie's medical records. From 2011 until 2013 Leslie received treatment from multiple physicians. Though she was first diagnosed with Fibromyalgia during the covered period, no medical records

1 indicate that Leslie had any trouble standing, sitting, or walking or that she was unable
 2 to lift at some amount of weight. Indeed, multiple records of physical examinations
 3 note that Leslie was seated comfortably and not in any acute distress. Furthermore,
 4 after losing her Kaiser coverage Leslie weaned herself off a Fibromyalgia treatment
 5 drug, supplementing with others, without issue. Her medical records do reveal
 6 complaints of chronic pain, especially in her back and shoulders. However, to one
 7 physician Leslie stated the pain had occurred since a motor vehicle accident in prior
 8 years, not because of her Fibromyalgia. (Id. at 133.) At the very least, Leslie's medical
 9 records do not indicate she was in any acute distress or unmanageable pain from
 10 Fibromyalgia.

11 ***b. Plaintiff's LTD Application & Dr. McIntosh's Physician's
 12 Statement***

13 Secondly, Dr. McIntosh's statements in the Physician's Statement form part of
 14 Leslie's initial LTD Application support United's finding. In that form Dr. McIntosh,
 15 who had been treating Leslie since March 2012, indicated that Leslie had no physical
 16 restrictions and was able to sit, stand, and walk for up to eight hours in an eight hour
 17 workday. (See id. at 618.) Indeed, Dr. McIntosh implied that Leslie's problems were
 18 psychiatric and did not require restriction of her physical capabilities. (Id.)

19 ***c. Plaintiff's Appeal & Dr. Chung's New Physician's Statement***

20 On appeal Leslie submitted a new Physician's Statement form, this time filled
 21 out by Dr. Chung, as well as Dr. Chung's notes from her evaluation of Leslie on
 22 January 28, 2013. (Id. at 310-11; 312-15.) On the Physician's Statement form, Dr.
 23 Chung indicated that Leslie could only sit, stand, and walk for one to three hours in an
 24 eight hour workday. (Id. at 311.) However, she failed to include any restrictions on
 25 Leslie's actions. (Id.) Additionally, the Physician's Statement stated Leslie's primary
 26 condition was Fibromyalgia. (Id.)

27 However, as discussed above, all of this information is belied by Dr. Chung's
 28 own notes from her examination of Leslie on the same day. (See id. at 312-15.) In her

notes, Dr. Chung writes that Leslie has “secondary Fibromyalgia.” (Id. at 315.) While Dr. Chung’s notes do reflect that Leslie reported “chronic muscle aches, muscle sensitivity, chronic sleep disturbance, and fatigue,” she fails to note any discomfort or difficulty Leslie had in sitting, standing, or walking. (Id.) Moreover, in Dr. Chung’s notes from Leslie’s physical examination, Dr. Chung stated Leslie was “comfortably seated in no acute distress.” (Id. at 314.) Thus the bulk of Dr. Chung’s recorded observations demonstrates that Leslie is not disabled.

Additionally, it is worth noting that Leslie’s claimed reason for not submitting Dr. Chung’s paperwork with her initial LTD Application, that she had lost her Kaiser coverage and thus could not have her rheumatologist fill out the requisite paperwork, cannot be squared with what actually occurred. Despite the lapse of her Kaiser coverage, Leslie did have a Kaiser doctor, Dr. McIntosh, prepare the treating physician’s statement. Leslie has offered no explanation why her Kaiser rheumatologist was any less able to fill out the paperwork than was Dr. McIntosh. Moreover, at about the time she applied for disability benefits, she made and kept an appointment with Dr. Chung, a rheumatologist at Facey Medical Group. (Id. at 390.) Thus, it appears that Leslie could have obtained a statement from the Kaiser rheumatologist and that she could have supplemented her application with a statement from Dr. Chung had she thought it important.

d. The Work Status Reports Ordering Leslie Off Work

There is some evidence that Leslie is unable to work because of her Fibromyalgia. Leslie was found not able to work by multiple physicians and ordered off work six times in 2012. (See id. at 619-24.) Aiding Leslie’s claim that her Fibromyalgia is Totally Disabling, Fibromyalgia was twice listed as the sole cause of such work status reports. (See id. at 622, 624.) However, it is telling that the doctor who ordered her off work three times, Dr. McIntosh, did not believe that Leslie was Totally Disabled from her Occupation as evidenced by Dr. McIntosh’s Physician’s Statement in Leslie’s initial LTD Application. Thus, this evidence does not strongly

support Leslie's claim that she is Totally Disabled.

Accordingly, the Court finds that the vast weight of the evidence demonstrates that Leslie is not Totally Disabled from her Occupation.

4. LESLIE'S FIBROMYALGIA IS A PRE-EXISTING CONDITION⁸

Finally, even if the Court were to conclude that the OA had improperly assessed Leslie's job duties and that Leslie was Totally Disabled from performing those duties due to Fibromyalgia, it would not change the outcome. The evidentiary record supports the conclusion that the Fibromyalgia was a pre-existing condition either secondary to her severe clinical depression or independently based on her long-standing complaints of body pain.

Leslie began working at CHC in September 2011. In an August 2011 visit to FMAN, Leslie complained of shoulder and upper back pain although no diagnosis was made at the time. (Id. at 587.) In her first visit to a doctor at Kaiser in January 2012, she reported to Dr. Roraldo her history of depression and pain in her neck and shoulders. (Id. at 133.) Leslie connected the pain to an automobile accident in June 2011. (Id.) However, in a visit to Dr. Roraldo in May 2012, she reported that she had endured generalized body pains for at least eight years. (Id. at 174.) She was referred for a psychiatric evaluation and was seen by Dr. McIntosh, who considered Fibromyalgia as a possible cause of Leslie's body pains. (Id. at 544.) She was then referred to a rheumatologist who took a detailed patient history in which he noted "diffuse body pain (non-neuropathic) began in late teen (19)." (Id. at 196.) Thereafter, Leslie's medical records reflect a first diagnosis of Fibromyalgia, which was based on evidence that she had suffered with body pain for years.

This evidence strongly supports the conclusion that Fibromyalgia was a pre-existing condition and that resultant disability was excluded from coverage. Whether it was secondary to her severe depression seems likely from the evidence. For example,

⁸As noted above, this issue was not addressed in United's denial of Leslie's appeal. However, because both parties argue the point, the Court briefly responds to their arguments in this section of its order.

1 Dr. Chung, a rheumatologist, noted that Leslie had reported her depression and anxiety
2 and “explain[ed] also that she has secondary Fibromyalgia . . .” (Id. at 390.) Dr.
3 Chung noted that he counseled Leslie on the importance of treating her depression “in
4 order to derive benefit also in her Fibromyalgia symptoms. (Id.) Dr. Tang noted that
5 Leslie had suffered from depression from at least the age of 10 and that she had
6 developed the Fibromyalgia symptoms in her late teens. (Id. at 196.) Thus, although
7 the genesis of the Fibromyalgia is ultimately not material to the outcome, the evidence
8 shows that the symptoms were present for many years before her work at CHC and
9 appeared to be an outgrowth of the major depression. Because her Fibromyalgia, which
10 her revised treating physician’s statement indicates is the cause of her disability, was a
11 pre-existing condition, United properly denied the application for benefits.

12 **C. CONCLUSION**

13 The weight of the evidence indicates that lifting 40-50 pounds was not a
14 Substantial and Material Act that was required in Leslie’s Occupation under the LTD
15 Plan, and thus, the Occupation that United used in evaluating Leslie’s claim was proper.
16 Additionally, the weight of the medical evidence indicates that Leslie is not Totally
17 Disabled from performing her Occupation by her Fibromyalgia. Leslie has therefore
18 failed to meet her burden of proving that she is Totally Disabled under the policy.
19 Finally, the evidence supports the conclusion that Leslie’s Fibromyalgia was a pre-
20 existing condition within the meaning of the policy.

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IV.

CONCLUSION

Based on the reasoning given above, the Court finds in favor of United and
ORDERS United to submit a proposed final judgment consistent with this order by the
close of business on **November 5, 2014**.

IT IS SO ORDERED.

Dated: October 27, 2014

Gary Feiss

**Gary Allen Feess
United States District Judge**